Supreme Court, U.S.
FILED
FEB 12 1992
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91-1431

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

ROMA JEAN BARGER and
RICHARD O. BARGER, JR. and
KEVIN S. BARGER and
JOHN B. BARGER

Petitioners

v.

COURIER JOURNAL AND LOUISVILLE TIMES
COMPANY AND GANNET CO., INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Larry B. Franklin
Counsel of Record
Michael R. Hance
David B. Gray
Franklin & Hance, PSC
505 West Ormsby Ave.
Louisville, Kentucky 40203
(502) 637-6000

February 12, 1992

QUESTION PRESENTED

I. Wherein lies the balance between the rights granted by the First Amendment of the Constitution of the United States and an individual's right of privacy when a newspaper prints, and later disseminates, a photograph, taken during a trespass, of an individual as he lay dead or dying.

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The petitioners, Roma Jean Barger, Richard O. Barger, Kevin S. Barger, and John B. Barger respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Kentucky Court of Appeals, upon which the Supreme Court of Kentucky entered an order denying discretionary review on November 14, 1991.

OPINIONS BELOW

The Order Dismissing the Complaint enterd by the Jefferson County Circuit Court is reprinted in the appendix hereto at 3a.

The opinion of the Kentucky Court of Appeals is reprinted in the appendix hereto at 2a.

The Order Denying Discretionary Review entered by the Supreme Court of Kentucky is reprinted in the appendix hereto at 1a.

JURISDICTION

The Petitioners respectfully request the Court review the judgment of the Kentucky Court of Appeals rendered on April 12, 1991. Petitioners were denied a rehearing by the Kentucky Supreme court on November 14, 1991. The jurisdiction of this Court to review the judgment of the Kentucky Court of Appeals is invoked under 28 U.S.C § 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This case arose out of the September 14, 1989, slaying of Richard Owen Barger, the petitioners' husband/father, by Joseph Wesbecker who inflicted five gun shot wounds to Mr. Barger's body with an AK-47 assault rifle. At the time of the shooting, Mr. Barger was inside Standard Gravure plant performing his job duties as he had done for many years. Following the shooting, the police immediately sealed the building to investigate the shooting. A photographer employed by the respondents, abusing the relationship between respondents and Mr. Barger's employer, crossed the police line

to take Mr. Barger's photograph as he lay dead or dying on the floor.

The following morning, September 15, 1989, the respondent, printed a front page photograph of Mr. Barger's body as he lay dead or dying in a pool of blood. The family was shocked and horrified upon seeing the picture of their father. The petitioners contacted the Courier Journal to express their outrage and intense disapproval of the gruesome photograph. Although Mrs. Barger was still crying and upset, she attempted to talk to Mr. David Hawpe, editor of the Courier-Journal, and pleaded and begged with him not to run this photograph again. Mr. Hawpe's responses were sarcastic and less than cordial. The Barger's were informed in no uncertain terms that the Courier Journal would print whatever they chose to print and there was nothing the Bargers could do about it.

Mrs. Barger's call was transferred to a Mr. George Gill who admitted to Mrs. Barger that he thought the picture was in bad taste and on the

gory side and that he himself was not sure that they should have run the picture. After lengthy debate, he stated that he had left the decision concerning the photograph to Mr. Hawpe, who decided to run the photograph on the front page.

The invasion into the privacy of the petitioners and the reckless publication of the photograph of Mr. Barger's body proximately caused the petitioners to experience indescribable severe emotional distress. This distress and outrage was shared by the overwhelming majority of subscribers to the Courier Journal, who wrote to its editor to denounce the publication as: ghoulish, insensitive, cruel, pointless and obscene. By the Courier Journal's own admission, the overwhelming majority of the community who responded to the photograph were outraged at it's printing.

Petitioners' distress was further compounded when the respondents released the photograph for national circulation, having first rudely and

harshly rejected the pleas of the petitioners not to do so.

Subsequently the petitioners sought redress for invasion of privacy and the tort of outrage in the Jefferson County Circuit Court.T h e petitioners raised the issues of invasion of privacy and the intentional infliction of emotional distress in the original complaint filed with the Jefferson County Circuit Court, Louisville, Kentucky. Paragraph XII of said complaint stated as follows;

> That the aforementioned extreme and outrageous conduct of Defendant, Courier journal and Louisville Times Company, resulted in the invasion of the Plaintiff's rights to privacy through the unreasonable publicity and depiction of a most delicate and private matter, thereby causing the Plaintiffs to be injured and incur damages.

Based upon multiple briefs by the parties to the action, an order dismissing the Appellant's complaint was signed and entered in the Jefferson Circuit Court on February 14, 1990. The Jefferson Circuit Court's dismissal was

based upon a failure to state a claim upon which relief could be granted.

A Notice of Appeal was filed with the Jefferson Circuit Court on March 1, 1990 and in a Prehearing Statement filed with the Kentucky Court of Appeals on March 13, 1990, the petitioners again raised the issues of intentional infliction of emotional distress, invasion of privacy, and the balance between freedom of the press and the common law right to recover for injury.

The petitioners filed a brief in support of the Appeal on July 24, 1990 again raising issues as to the breadth of the protection provided to the press by the First Amendment where personal common law rights are at stake. The petitioners asserted that even though the crime, in which Mr. Barger was a victim, was of legitimate interest, the condition of his body, while still within the confines of a private business establishment was not. Petitioners further asserted that the manner in which the photograph

was obtained should bear upon the respondents' culpability as well.

On April 12, 1991, the Kentucky Court of Appeals, after briefs and oral argument affirmed the lower court's dismissal of the complaint in a two to one decision. Of interest is the Court's failure to address the constitutional issue presented to it. The Court affirmed the dismissal stating in part; "A contrary conclusion, we note, would create serious questions regarding a possible violation of the Courier's first amendment rights. See Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)." The Court of Appeals held that the Courier Journal's conduct did not rise to a level beyond all decency, that Appellants lacked standing and that the photograph involved a matter of legitimate concern to the public.

A Motion for Discretionary Review was filed with the Supreme Court of Kentucky on May 5, 1991. The Federal questions upon which the

Appellants sought review were;

1. Will private citizens' common law rights be curtailed by operation of Hustler Magazine v. Falwell, 485 U.S. 46, 108 S.Ct. 876 (1988) which dealt strictly with a well-known public figure in a narrowly defined opinion?

2. What limits, if any, are there on the rights granted by the First Amendment to the Constitution of the United States when they directly conflict with a citizen's common law right to civil recovery based upon the tort of outrage?

The Supreme Court of Kentucky, without comment, denied the Motion for Discretionary Review on November 14, 1991.

REASONS FOR GRANTING THE WRIT

Guidelines must be set in regard to the freedom of the press as it exists in the First Amendment to the Constitution of the United States when the alleged exercise of these rights operate to deny a victim his or her rights to privacy, to recover damages and have the courts open.

The lower court essentially abrogated the petitioners right to redress for the injuries they incurred based upon their interpretation of what constitutes a legitimate subject of public interest.

Respondents Violated the Bargers' Right to Privacy. At one time the courts did not recognize a right of privacy, but in 1890 an article entitled The Right to Privacy, written by Louis D. Brandeis, was published in the Harvard Law Review and the "right" began to evolve. As with many other concepts of injury and recovery it has and should continue to evolve in response to the dynamic nature of our society, and as that society evolves we should continue to assert and protect, through the

inveterate adaptation of the law, a concept fundamental to our continued existence, the rights of the individual.

Justice Louis Brandeis contended that the growing abuses of the press made a remedy upon such a distinct ground essential to the protection of the private individuals against the outrageous and unjustifiable infliction of mental distress. See Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890). The respondents' actions in obtaining and publishing Mr. Barger's death-pose was an unjustified and outrageous intrusion into the privacy of the petitioners. Freedom of the press is a fundamental bulwark of American democracy, but it is so because our forefathers were concerned with the preservation of free political thought. Had the founding fathers been able to see into the future and view the intrusive abilities of a modern press, the right of privacy would have developed long before the late 1800's.

Will the first Amendment again serve not the individual, but those wishing to use it as a shield against responsibility? Only the pecuniary interest of the Respondent was served by publication of the photograph; the legitimate interests of the general public and the individual were trampled upon. The right to privacy is generally recognized as the right to be left alone, to be free of unwarranted interference by the public about matters not their concern, or the right of a person to be free from unwarranted publicity. Brents v. Morgan, 221 Ky. 765, 299 S.W. 967, 969 (1927). The Restatement (Second) of Torts addresses invasion of privacy as follows;

> § 652. Publicity Given to Private Life One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that:
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

While the crime itself was of a legitimate public concern, the publishing of a photograph depicting the condition of Richard Barger's body was a matter of private concern only for the family. The Respondents intentionally invaded this emotional privacy when they published the photograph. It is an unwarranted invasion of privacy when a news organization, through a blatant trespass publishes a private picture that would clearly cause severe emotional distress to not only the wife and children of the slain man, but to the other survivors of the tragedy as well.

One need only look to the public outcry which followed the publication of the purloined photograph to assert that it was highly offensive to a reasonable person. Had the public been aware of the manner in which it was obtained their condemnation would surely have been even stronger. The manner in which the photograph was obtained and its publication represent a total lack of reasoned judgment on

the part of the respondents and constituted an invasion of the emotional privacy of Mrs. Barger and her children.

The respondents have defended their acts, and the Kentucky courts have endorsed them, as a privilege granted by the First Amendment, since it contends the photo was "legitimate and newsworthy," a defense which in large part relies upon the implicit protection from censorship of the press provided by the First Amendment. The First Amendment however, "is not a shibboleth before which all other rights must succumb." Le Mistral, Inc. v. Columbia Broadcasting System, 61 A.2d 491, 402 N.Y.S.2d 815, 817 (1978). In an inspired dissent on the width and breadth of this defense, Chief Justice Larson of the Iowa Supreme Court, joined by Justices Bliss and Hays, noted that they were not advocating that the court act as a censor, but that it was for the court to provide a remedy for a wrong. Bremmer v. Journal-Tribune Publishing Co., 76 N.W.2d 762, 769 (Iowa 1956).

The dissenters also quoted Prosser on Torts;

> Again the privilege is not unlimited, but the line is a most difficult one to draw. The cases in which the privilege has been found to be exceeded have involved outrageous methods such as the theft of a photograph, or extreme catering to the morbid and the sensational .
>
> Id. at 769.

While the general public has a legitimate interest in the events which took place at Standard Gravure, such an interest does not support the actions of the Courier Journal in obtaining and publishing the photograph of Mr. Barger. As the Respondents have noted, the Bargers do not contest the Respondents' written account of how and why the tragic event occurred. Mr. Wesbecker's motivation, the types of weapons he used, even names of the killed and wounded are of legitimate public concern. Here, the issue is whether the unauthorized printing and dissemination of a photograph of Mr. Barger as he lay dead or dying with five bullet wounds was of legitimate public concern with due regard for

the manner in which it was obtained.

The First Amendment does not give the press a license to trespass. Le Mistral, at 817 (emphasis added). It seems however that the present holding in favor of the respondents has, for all intents and purposes, granted the press such a license. A free press is not threatened by requiring its agents to act within the law. Galella v. Onassis, 487 F.2d 986, 996 (2d Cir. 1973). The respondents abused their constitutional privilege and the Kentucky Courts have failed to fully address this issue.

Where and how to draw the line between legitimate and private matters is certainly difficult, but at some point in time a workable formula must be established. This case gives the Court that opportunity.

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.

Restatement (Second) of Torts § 652D, comment

h (1977). Petitioners contend that a photograph obtained via trespass is not only "sensational prying . . for its own sake," but in this instance also contains an element of morbidity with which "a reasonable member of the public . . . would say he has no concern."

The actual position of the victims as death overcame them may indeed be of some legitimate interest to those who sought to reconstruct and analyze the crime, but to assert that it is of sufficient interest to legitimize the unauthorized entry of aphotographer and the subsequent display and selling of it for profit is quite another. Admittedly, the cases support a newspaper's right to report and photograph events that occur in <u>public</u> as well as the further opening of the judicial system to such journalistic intrusion, there is however no such support for the illegal entry of reporters on private property in search of stories. Essentially the lower courts' ruling allowed the respondent through publication of the photograph

to cover the tracks it left in obtaining the photograph.

The photographic representation of the details of Mr. Barger's position at death in a non-public context is not of legitimate public concern. If such behavior is allowed to continue then we need not withhold the names of traffic fatalities until "the next of kin is notified," let the reporters trace the license plate or take a close up shot of the mutilated corpse and be first to notify the family by showing them a morbid photograph and videotape their hysteria for commercial exploitation.

How far can the "right of the public to know" be allowed to outweigh a family's right to be let alone in its unquestioned grief for the loss of its husband and father? Let us not forget that the Bill of Rights was recognition of the rights of the individual as well as the press. The very history of the right of privacy finds in part, its support through this concept of individual liberty. At some point the needs of

the individual must surely predominate the power of the press, and if that point is to be determined by what is "legitimate and newsworthy," then at some point this Court must decide where that line is to be drawn. The public's interest in the dissemination of the news must be balanced against the Petitioners' interest in peace of mind and freedom from emotional distress. See Gill v. Curtis Pub. Co., 239 P.2d 630, 634 (1952).

Had the petitioners been aware of the photograph before its publication, they would surely have sought an injunction. While such a point is moot in the present action, it is intended to remind the Court of the underlying aspects of how this photograph came to be. The photograph was not the record of a public event, sought in the interest of serving and informing the public, it was the product of a trespass committed in furtherance of the respondents' self-interest in sensationalism and sales. Is the public's legitimate interest in newsworthy

events to be served in such a manner? May the respondent be allowed to cloak its impropriety with "freedom of the press?" Does the end justify the means? Petitioner fails to see how such a photograph, taken in the course of a trespass, can gain such legitimacy.

What is also at stake in this action is the common law right to recovery. A determination must be made regarding a family' right to be let alone and more specifically the right to not have a photograph of their slaughtered loved one printed on the front page of the newspaper thereby exacerbating their personal tragedy.

The tort of outrage in Kentucky grew out of the ancient common law right of a surviving spouse or next of kin to recover in tort for mental anguish due to the infliction of injury to a corpse. See Ferguson v. Utilities Elkhorn Coal Co., Ky., 313 S.W.2d 395 (1958); Resthaven Memorial Cemetery Co. v. Volk, 286 Ky. 291, 150 S.W.2d 908 (1941); Louisville Cemetery Association v. Downs, 241 Ky. 773, 45 S.W.2d 5

(1931). This tort is currently defined by the case of Craft v. Rice, Ky., 671 S.W.2d 247 (1984) wherein Kentucky adopted Restatement (Second) of Torts §46.

Section 46. Outrageous conduct causing severe emotional distress.

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress.

There is a right to be free of emotional distress arising from conduct by another. Craft at 251. The Bargers' right to this freedom has been violated and a remedy should be provided. The tort of outrage seeks to prevent those deviations from reasonable bounds of decency which, in a civilized community, must be deemed as utterly intolerable.' Craft at 250. Restatement (Second) of Torts §46 Comment d (1977) states that "Generally the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to

exclaim, `Outrageous!'"

This scenario has been played out in the present situation. The Respondents have published the photograph in question and disseminated it throughout the community and the community has responded with overwhelming cries of "Outrageous". The testimony of the Respondents themselves would prove that a majority of the community was outraged and responded negatively to the Courier Journal's deviation from reasonable bounds of decency.

The Courier Journal was overwhelmed by phone calls and letters to the editor expressing the disgust of its readers, the reasonable person of our civilized community. "Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." Restatement (Second) of Torts §46, comment h (1977).

Not only was the publication of the gruesome

photograph of Mr. Barger's body outrageous conduct, the Respondent's photographer acted outrageously in obtaining said photograph. Richard Owen Barger was not a part of a public scene, but on the contrary, he was inside a private building and a part of a crime scene which was sealed off from public view. The respondents' photographer was trespassing into an unauthorized area when he took the photograph of Mr. Barger. The photographer could only gain access because the respondents' business is physically interconnected with Mr. Bargers' employer. The lower courts have essentially condoned this type of activity.

Respondents' actions certainly qualify as reckless; a deliberate disregard of a high degree of probability that emotional distress will follow. Restatement (Second) of Torts §46, comment i. It is certainly foreseeable and most probable that a family would experience severe emotional distress upon viewing the bloody body of their husband/father on the front page of the

newspaper. The respondents knew or should have known that the petitioners would have been more susceptible and sensitive to emotion distress in consideration of the tragic loss this family had just suffered. But respondents were heedless of the fact that the petitioners did not wish to view the body of their husband/father in that state, and that they never sought to display the body to the entire community. The respondents did what they wished, and were unmoved by the grief and pain they knew or, in the exercise of ordinary care, should have known they were inflicting on the petitioners.

The respondents' reckless infliction of emotional distress was wrought as a result of their attempt to entertain and titillate their readers with the outrageous photograph. The respondents have espoused the belief that they are the judges of their own cause. Applying those standards by which life in a civilized community is engendered and fostered, it is impossible to see Respondents' actions herein as

anything other than outrageous and extreme.

CONCLUSION

The lower courts have denied the petitioners the means by which their injuries would be redressed. This denial has been based upon the assertion that they did not possess a privacy interest in a photograph taken of their deceased father/husband, which was printed and later disseminated throughout the press. The subject of the photograph was deemed to be of legitimate public concern; newsworthy, even though taken by a photographer, who was upon the premises without permission. There are limits upon freedom of the press and this action should be remanded to the Supreme Court of Kentucky as those limits have been exceeded.

Respectfully submitted

Larry B. Franklin
Counsel of Record
Michael R. Hance
David B. Gray
Franklin & Hance, PSC
505 West Ormsby Ave.
Louisville, Kentucky 40203
(502) 637-6000

APPENDIX 1a

SUPREME COURT OF KENTUCKY

91-SC-420-D
(90-CA-473)

ROMA JEAN BARGER; RICHARD O. BARGER, JR,; KEVIN S. BARGER; and JOHN B. BARGER — MOVANTS

JEFFERSON CIRCUIT COURT
NO. 89-CI-7120

COURIER JOURNAL AND LOUISVILLE TIMES COMPANY, and GANNETT CO.,INC. — RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: November 14, 1991

S/ROBERT F. STEPHENS
CHIEF JUSTICE

APPENDIX 2a

RENDERED: APRIL 12, 1991; 3:00 P.M.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 90-CA-473-MR

ROMA JEAN BARGER; RICHARD O. BARGER, JR.; KEVIN S. BARGER; and JOHN B. BARGER — APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
V. HONORABLE BENJAMIN F. SHOBE, JUDGE
ACTION NO. 89-CI-7120

COURIER JOURNAL AND LOUISVILLE TIMES and GANNETT CO., INC. — APPELLEES

AFFIRMING

* * * * * * * * *

BEFORE: EMBERTON, GUDGLE, and MILLER, Judges.

GUDGEL, JUDGE: This is an appeal from an order entered by the Jefferson Circuit Court dismissing a tort action filed as a result of the publication by appellee Courier-Journal and Louisville Times Company (Courier) of the picture of a mass murder victim. Appellants, members of the victim's family, contend that the court erred by dismissing their action because

the allegations in their complaint were sufficient to state claims for relief for the torts of outrageous conduct and invasion of privacy. We disagree with their contentions. Hence, we affirm.

On September 14, 1989, a mentally disturbed former employee of the Standard Gravure Corporation in Louisville entered the company's premises with an AK-47 assault rifle and shot twenty people, killing seven of them, and then killed himself. A photographer for the Courier took a picture of a victim of this rampage as he lay dead or dying at his work station. The offending photograph was then published on the Courier's front page the next morning. The Courier also released the photograph to other news media for purposes of national distribution. Although the caption accompanying the photograph in the Courier omits the name of the victim, few in our society would argue that publication and distribution of the photograph was not in poor taste, insensitive, and

indelicate.

Emotionally distressed by the photograph's publication and distribution, the members of the victim's family filed a tort action for damages against the Courier. In their complaint appellants attempted to state claims for relief for the torts of outrageous conduct and invasion of privacy. The court, however, subsequently granted the Courier's motion to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted. This appeal followed.

First, appellants contend that the court erred by finding that their complaint did not state a claim for relief for tort of outrageous conduct. We disagree.

Appellants argue that this jurisdiction recognize that there is a right to be free of emotional distress arising from the conduct of another. See Craft v. Rice, Ky., 671 S.W.2d 247 (1984). Although they acknowledge that the conduct causing emotional distress must amount

to a deviation from all reasonable bounds of decency, to a degree that would be deemed utterly intolerable in a civilized community, appellants argue they could establish by proof at trial that the members of the Louisville community were indeed outraged to the extent which is necessary to maintain an action for outrageous conduct. Specifically, appellants rely upon the fact that the Courier received numerous phone calls and letters from members of the community expressing outrage at the publication of the offending photograph, and the fact that the Courier's photographer allegedly trespassed upon private property in order to obtain the photograph. Further, appellants urge that the Courier obviously was bound to know that the members of the victim's family would experience severe emotional distress as a result of the publication of the photograph, but published it anyway. Appellants urge that these facts, all of which were pleaded in their complaint, were sufficient to state a claim for

relief.

Appellants' argument is appealing. Nevertheless, our review of the relevant authorities leads us to conclude that the court did not err by dismissing appellants' claim for outrageous conduct.

Just recently, our supreme court addressed and analogous situation which involved certain verbal communications. In Humana of Kentucky, Inc. v. Seitz, Ky., 796 S.W. 2d 1 (1990), the plaintiff was admitted to the defendant's hospital due to pregnancy complications. Some ten days later, the plaintiff began experiencing pain which she believed was the beginning of labor, but a nurse who examined the plaintiff disagreed with that opinion. The pain continued through the night into the next morning, at which time another nurse checked the plaintiff's vital signs and left her room. The plaintiff then experienced a sharp pain and began delivering her baby into a bedpan. Although both the plaintiff and her roommate attempted to

summon nursing help by pushing intercom buttons, nurses did not arrive for 12-15 minutes, and the plaintiff believed that her intercom had been intentionally disconnected. After several nurses responded, one of them shouted to the plaintiff to "shut up" because she was disturbing other patients. Another nurse, when asked by the plaintiff where she was preparing to take the deceased baby, responded "Honey, we dispose of them right here at this hospital." The court held as a matter of law that this conduct was neither a deviation from all reasonable bounds of decency, not conduct which was atrocious and utterly intolerable in a civilized community. Hence, it did not amount to outrageous conduct within the purview of Craft v. Rice, supra. The court reached this conclusion even though it acknowledged that the nurses's statement regarding disposal of the stillborn child was cold, callous, and lacking in sensitivity, because the court believed that conduct as a whole still did not rise to the

level of conduct which is "beyond all decency." As succinctly stated by the court, "the evidence relied on shows, at worst, a lack of compassion and lack of taste, but certainly does not comport with the criteria in Craft and in the Restatement 46."

As we interpret Humana, our supreme court does not intend to afford protection to plaintiffs under the outrageous conduct umbrella if the conduct of the defendant which causes emotional distress only rises to the level of being cold, callous, lacking in sensitivity, lacking in compassion or lacking in good taste. Such is precisely the situation in the case at bar. As an intermediate appellate court, we are bound to follow the dictates of Humana. SCR 1.030(8) (a). Hence, we conclude that the facts alleged in appellants' complaint simply were not sufficient to state a claim for relief for the tort of outrageous conduct. It follows that the trial court did not err by dismissing that

claim.[1]

Next, appellants contend that the court erred by finding that their complaint did not state a claim for relief for the tort of invasion of privacy. Again we are constrained to disagree.

This jurisdiction adopted the principles of the tort of invasion of privacy, as enunciated in the Restatement (Second) of Torts (1976), in McCall v. Courier Journal and Louisville Times Company, Ky., 623 S.W.2d 882 (1981), cert. denied, 456 U.S. 975, 102 S.Ct. 2239, 72 L.Ed.2d 849 (1982). A review of these principles establishes that the Courier cannot, as a matter of law, be adjudged liable for the tort of invasion of privacy in the instant action.

The rule which is applicable here is set forth in 652D of the Restatement as follows:

> One who gives publicity to a matter concerning the private life of

---

[1]A contrary conclusion, we note, would create serious questions regarding a possible violation of the Courier's first 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

> another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

Before addressing the issue of whether appellants' complaint states a claim for relief under this rule, however, we must first address the Courier's contention that appellants lack standing to maintain such an action. As noted by the Courier, 652I of the Restatement recognize that ordinarily an action for invasion of privacy has been invaded. Indeed, the accompanying Comment a and b specifically acknowledge that in the absence of a statute an action cannot be maintained after the death of an individual whose privacy has been invaded, and that such an action cannot be maintained by members of an individual's family unless their own rights of privacy have also been invaded. Here, since the photograph published and distributed by the Courier did not disclose the identity of the members of the deceased victim's

family, their right of privacy was clearly not invaded by the publication of the photograph. Accordingly, we conclude that appellants did not have standing to maintain this action. Our conclusion is consisted with the authorities from other jurisdictions which have considered this same issue. See, e.g., Cordell v. Detective Publications, Inc., 419 F.2d 989 (6th Cir. 1969); Kelly v. Post Publishing Co, 160 cal. App. 2d 718, 325 P.2d 659 (1958); Kelley v. Post Publishing Co., 98 N.E.2d 286 (Mass. 1951). Moreover, we note that appellants have failed to address this defense in their reply brief. Indeed, appellants have cited no authorities which support their right to maintain an action for invasion of privacy in the circumstances presented here.

We would be justified in affirming the court's order dismissing appellants' complaint for invasion of privacy based solely on the standing issue. However, the likelihood that the issues involved in the instant action will

arise again in the future prompt us, in the interest of judicial economy, to go further and to address the merits of appellants' claim.

It is clear that the Courier's publication of the victim's photograph would be highly offensive to most reasonable persons. Thus, for the Courier to avoid liability under 652D, the published photograph must involve a matter of legitimate concern to the public. As noted in Comment d to 652D:

> When the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person. The common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate concern, there is no invasion of privacy.

Further, the Restatement also specifically recognizes that a private figure, such as the victim in the instant action, may involuntarily become a subject of legitimate public concern. Comment f to 652D speaks to this point as follows:

There are other individuals who have

not sought publicity or consented to it, but through their own conduct or otherwise have become legitimate subject of public interest. They have, in other words, become "news." Those who commit crime are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed. The same is true as to those who are so unfortunate as to be present when it is committed, as well as those who are the victims of catastrophes or accidents or are involved in judicial proceedings or other events that attract public attention. These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them.[2]

---

[2]Two hypothetical illustrations following this comment are particularly pertinent to the instant action:

> 14. A is run down in the street by an automobile and taken to a hospital. B newspaper publishes an account of the accident, together with a picture of A taken by a reporter after the event. This is not an invasion of A's privacy.
>
> . . . . .

(Footnote Continued)

(Emphasis added.)

Moreover, comment g to 652D specifically recognizes that publication of information similar to that published in the instant action is authorized by what might be termed the "matters of public concern" exception to the general rule:

> Included within the scope of legitimate public concern are matters of the kind customarily regarded as "news." To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm. Authorized publicity includes publications concerning homicide and other crimes.....

In light of these principles, it is clear that the victim whose picture was published in

---

(Footnote Continued)

> 16. While A is walking along the street with her husband, he is set upon by thugs and murdered in her presence. B Newspaper publishes an account of the event, with a picture of A. This is not an invasion of A's privacy.

the Courier involuntarily became a legitimate subject of public interests, and that the offensive photograph of him which was published by the Courier was a matter of the kind customarily regarded as news. Therefore, the Courier clearly was authorized to publish the legitimate public concern. This conclusion is supported by numerous authorities from other jurisdictions. See, e.g., Cape Publications, Inc. v. Bridges, 423 So.2d 426 (Fla.1982), cert.denied, 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 229 (1983); Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956); Bremmer v. Journal-Tribune Publishing Co., 247 Iowa 817, 76 N.W. 2d 762 (1956). In fact, one court has gone so far as to state that "the `newsworthiness' defense has been recognized by commentators as being so broad as to nearly swallow the tort." Cape Publications v. Hitcher, 549 So.2d 1374, 1377 (Fla.1989).

Moreover, appellants' argument that the "newsworthiness" defense is not available to the

Courier because the victim's photograph resulted from a "blatant trespass" is unavailing. In the first place Standard Gravure, the owner of the building in which the picture was taken, did not claim that a trespass occurred. Further, the photographer who took the offending picture gained access to the crime scene through hallways and tunnels which connect the Standard Gravure building and the Courier's adjoining building, and there is no allegation that he lacked permission to enter the areas in which the crimes occurred. More importantly, the crime took place on public business premises, and news media personal are customarily permitted to such scenes whenever they involve events of great public concern. We are therefore of the opinion that the Courier cannot be denied its defense of newsworthiness on the ground that its photographer committed a trespass in order to obtain the victim's photograph. See Florida Publishing Company v. Fletcher, 340 So.2d914 (Fla.1877), cert.denied,

431 U.S. 930, 97 S.Ct. 2634, 53 L. Ed.2d 245 (1977).

Finally, appellants also contend that their complaint stated an actionable claim for abuse of the right to freedom of the press as guaranteed to the Courier by section 8 of the Kentucky Constitution. This contention is without merit. Section 8 of the constitution, part of the Kentucky Bill of Rights, is intended to protect rather than to detract from the right of freedom of the press. Although section 8 recognizes that the press may be adjudged liable for abusing its right to freedom of the press as discussed above, the Courier's publication of the offending photograph did not amount to tortious conduct of a type which is actionable under Kentucky law. It follows, therefore, that the Courier cannot be adjudged liable for having abused the rights guaranteed to it by section 8 of the constitution.

The court's order is affirmed.

MILLER, J., CONURS.

EMBERTON, J., DISSENTS.

ATTORNEY FOR APPELLANTS:

Larry B. Franklin
Michael R. Hance
David B. Gray
Louisville, Kentucky

ATTORNEYS FOR APPELLEES:

Jon L. Fleischaker
William H. Hollander
Louisville, Kentucky

APPENDIX 3a

NO. 89-CI-07120 JEFFERSON CIRCUIT COURT
DIVISION (15)

Roma Jean Barger, ET AL. PLAINTIFFS

v.

COURIER-JOURNAL AND
LOUISVILLE TIMES COMPANY, ET AL. DEFENDANTS

ORDER

Defendants, Courier-Journal and Louisville Times Company ("Courier-Journal") and Gannett Co., Inc. ("Gannett"), having moved the Court to dismiss the Complaint; the court having considered the memoranda and other documents filed by Defendants and Plaintiffs, having heard arguments of counsel and being otherwise sufficiently advised;

IT IS HEREBY ORDERED that Defendants' motion to dismiss the Complaint against them is granted. All of Plaintiffs' claims against Courier-Journal and Gannett are dismissed, with prejudice. This is a final and appealable order and there is no just cause for delay.

S/B.F. Shobe
Judge, Jefferson Circuit Court

Date: 2/14/90

Tendered by:

S/Jon L. Fleischaker

Jon L. Fleischaker
William Hollander
Wyatt, Tarrant & Combs
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

Counsel for Courier-Journal
and Louisville Times Co. and
Gannett Co., Inc.

(2)

Supreme Court, U.S.
FILED
APR 2 1992
OFFICE OF THE CLERK

No. 91-1431

In The

Supreme Court of the United States

October Term, 1991

ROMA JEAN BARGER, RICHARD O. BARGER, JR., KEVIN S. BARGER and JOHN B. BARGER,

Petitioners,

vs.

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY and GANNETT CO., INC.,

Respondents.

On Petition for Writ of Certiorari to the Kentucky Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

JON L. FLEISCHAKER
Counsel of Record
WILLIAM H. HOLLANDER
WYATT, TARRANT & COMBS
Attorneys for Respondents
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235

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No. 91-1431

In The

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ROMA JEAN BARGER, RICHARD O. BARGER, JR., KEVIN S. BARGER and JOHN B. BARGER,

Petitioners,

vs.

COURIER-JOURNAL AND LOUISVILLE TIMES COMPANY and GANNETT CO., INC.,

Respondents.

On Petition for Writ of Certiorari to the Kentucky Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Courier-Journal and Louisville Times Company and Gannett Co., Inc., respectfully pray that a writ of certiorari not be issued to review the judgment and opinion of the Kentucky Court of Appeals entered on April 12, 1991.

STATEMENT OF THE CASE

Richard Owen Barger was shot and killed at the Standard Gravure plant in Louisville, Kentucky on September 14, 1989. The same mentally disturbed gunman who shot Mr. Barger killed eight other individuals and himself, and injured twelve others, in the Standard Gravure rampage. The shootings, and particularly the assailant's use of an assault rifle, the importation and sale of which has been extremely controversial, created enormous public interest in Louisville and throughout the world.

The day after the shootings, Courier-Journal and Louisville Times Company ("Courier-Journal") published the photograph at issue in this action in its daily newspaper, *The Courier Journal,* as part of its extensive account of the tragedy. The newspaper account noted the location of at least four people's wounds ("shot in the legs"; "shot in the head"; "shot in the chest"; "shot in the back"), and stated that "the pressroom was awash with blood" after the shootings. The photograph at issue in this action showed Mr. Barger's body and the room in which he was killed. The caption which accompanied the photograph did not identify Mr. Barger. The photograph was subsequently released for publication by other media outlets in connection with their articles about the shootings, a practice which is common in the industry.

On September 21, 1989, one week after the shootings, Mr. Barger's widow and three sons (the "Bargers") filed their complaint against Courier-Journal and its parent corporation, Gannett Co., Inc. ("Gannett"), based on the publication of the photograph.[1] The complaint alleged state law claims of an invasion

---

1. Gannett is not liable to the Bargers for the same reasons that the Kentucky Court of Appeals found that Courier-Journal was not liable. Even if Courier-Journal were liable, Gannett's ownership and control of Courier-Journal would

(Cont'd)

of the Bargers' rights to privacy and intentional infliction of emotional distress. The complaint did not, and could not, deny that the photograph was an accurate depiction of the scene of Mr. Barger's death.

Courier-Journal and Gannett moved to dismiss the complaint and filed a brief which cited numerous similar cases which had been dismissed. The Bargers filed a response, but cited *no case* in which liability had been imposed for the publication of a photograph which accurately depicted a newsworthy event, like the one at issue here.[2] Because the complaint failed to state a claim upon which relief could be granted against either Courier-Journal or Gannett, the trial court dismissed the complaint.

On April 12, 1991, the Kentucky Court of Appeals affirmed the trial court's order, in an opinion which rested entirely on state law precedents. The Court of Appeals held that publication of the photograph did not constitute the outrageous conduct necessary to support a claim for intentional infliction of emotional distress in Kentucky. In so holding, the Court of Appeals merely applied the Kentucky Supreme Court's holding in *Humana of Kentucky, Inc. v. Seitz,* 796 S.W. 2d 1 (Ky. 1990), a case involving the

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(Cont'd)
not be sufficient to impose liability on Gannett, pursuant to Kentucky law. *Poyner v. Lear Siegler, Inc.*, 542 F.2d 955 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977), citing *Kentucky Auto Mechanics Service Co. v. Kentucky Auto Parts Co.*, 267 Ky. 531, 102 S.W. 2d 1022 (1937).

2. The Bargers' petition to this Court also cites no such case, and adds more heat than light to this dispute. The Bargers' contentions that Courier-Journal Editor David Hawpe was "sarcastic and less than cordial" to Mrs. Barger and that Hawpe stated "Courier-Journal would print whatever they chose to print and there was nothing the Bargers could do about it" (Petition at 3) are false, and irrelevant to the issues in this action.

treatment of a hospital patient, which raises no federal or constitutional issues. The Court of Appeals' only mention of the First Amendment to the United States Constitution was in a footnote, which recognized that a contrary decision under state law, imposing liability on Courier-Journal on these facts, "would create serious questions regarding a possible violation of the Courier's first amendment rights" (Opinion at 5 n.1).

In rejecting the Bargers' claim for invasion of privacy, the Court of Appeals held that the Bargers lacked standing to maintain the action, because *their* privacy was not invaded by the publication of the photograph of their husband and father. That decision was grounded solely in state law. The court separately held that, even if the Bargers had standing to maintain the action, no invasion of privacy could be established because "the Courier clearly was authorized to publish the offending photograph on the ground that it involved a matter of legitimate public concern" (Opinion at 9). The latter holding was again based on state law, and no federal issues were even discussed.

The Bargers moved the Supreme Court of Kentucky to grant discretionary review. The Supreme Court denied the motion on November 14, 1991.

The Bargers now seek to have this Court review the decision of the Kentucky Court of Appeals, despite the fact that it rested on state grounds and no federal question is presented.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS JUDGMENT RESTED ON STATE LAW GROUNDS AND THIS COURT LACKS JURISDICTION TO REVIEW IT.

This Court has jurisdiction to consider this case only if the judgment of the Kentucky Court of Appeals was based on federal law. *Michigan v. Long,* 463 U.S. 1032 (1983). Even where a state court mentions both federal and state grounds for its decision, this Court will not review the judgment "if the same judgment would be rendered by the state court after [this Court] corrected its views of federal law," because "such a review could amount to nothing more than an advisory opinion." *Id.* at 1042, quoting *Herb v. Pitcairn,* 324 U.S. 117, 126 (1945).

In this case, there is no indication that the Kentucky Court of Appeals based any of its decisions on federal law. In holding that the Bargers failed to state a claim for relief for the tort of outrageous conduct, the court relied on one state court decision, *Humana of Kentucky, Inc. v. Seitz,* 796 S.W. 2d 1 (Ky. 1990). That decision, which held that Kentucky would not recognize an outrage claim unless the alleged conduct was "beyond all decency" involved the treatment of a hospital patient and presented no constitutional questions.

The Court of Appeals' only reference to the First Amendment to the United States Constitution was in a footnote placed after the analysis which rejected the Bargers' claim on state law grounds. The court said: "A contrary conclusion, we note, would raise serious questions regarding a possible violation of the Courier's first amendment rights. *See Hustler Magazine v. Falwell,* 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988)". The mere mention

of the possible application of federal law, if a contrary conclusion had been reached on the state law issues, is inadequate to invoke the jurisdiction of this Court, because the decision clearly rested on state, rather than federal, law.

The judgment rejecting the Bargers' invasion of privacy claim also rests on state law principles. The Court of Appeals held that the Bargers lacked standing to bring the action, citing *Restatement (Second) of Torts* § 652I (1976). The court expressly recognized that the Bargers' complaint was properly dismissed "based solely on the standing issue" (Opinion at 7).

An alternative holding — that the privacy claim fails because the photograph involved a matter of legitimate public concern — was made only because of "the likelihood that the issues involved in the instant action will arise again in the future . . ." (Opinion at 7). The court held that the *Restatement*, as adopted by the Kentucky Supreme Court as a matter of state law, barred the Bargers' privacy claim. Of course, even if what the court called the "newsworthiness" defense to privacy claims were grounded in the First Amendment, which is not the case, the fact that the Bargers lack standing to bring a privacy claim in these circumstances would constitute independent and adequate state grounds for the decision, barring this Court's intervention.

The Bargers have virtually conceded that the state court relied on state law in affirming the dismissal of their complaint, noting that "the Court's failure to address the constitutional issue presented to it" is "of interest" (Petition at 7). In fact, the court's failure to address or rely on any federal grounds is dispositive, and the Bargers' petition should be denied for that reason alone.[3]

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3. Because the Bargers have argued that the Kentucky court was wrong in its application of state law, Courier-Journal feels compelled to respond. The (Cont'd)

II.

THE BARGERS' CLAIM FOR INTENTIONAL OR RECKLESS INFLICTION OF EMOTIONAL DISTRESS WAS PROPERLY DISMISSED.

The Kentucky Supreme Court first recognized the tort of intentional or reckless infliction of emotional distress, also known as the tort of outrage, in *Craft v. Rice*, 671 S.W. 2d 247 (Ky. 1984). *Craft* expressly adopted *Restatement (Second) of Torts* § 46 (1965):

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Restatement § 46. In 1990, the court reiterated the threshold requirements for the tort, holding that conduct by hospital personnel which the court characterized as "cold, callous, and lacking sensitivity" failed to meet the standards for an outrage claim, and that the trial court had properly granted summary judgment for the hospital company. *Humana of Kentucky, Inc. v. Seitz*, 796 S.W. 2d 1, 1 (Ky. 1990).

The court emphasized comment d of § 46 of the *Restatement*:

> It has not been enough that the defendant has acted

(Cont'd)
following discussion demonstrates that the Kentucky Court of Appeals was correct in affirming the dismissal of the Bargers' complaint as a matter of state law.

> with an intent which is tortious . . ., or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," . . . . *Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*

Humana, supra, 796 S.W. 2d at 3, quoting *Restatement* § 46, comment d (emphasis added by court). The court noted that even evidence which shows "a lack of compassion and lack of taste" is insufficient to meet the threshold requirement for the tort of outrageous conduct or intentional infliction of emotional distress in Kentucky. *Id.*, 796 S.W. 2d at 4.

The *Humana* decision reaffirmed that *courts* must make the initial determination whether the conduct complained of satisfies "the threshold requirements of the tort of outrageous conduct, so as to justify submitting the case to a jury". *Humana, supra,* 796 S.W. 2d at 1. That holding is in accord with the *Restatement,* which provides that "[i]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so." *Restatement* § 46, comment h.

Because the actions about which the Bargers complained failed to meet the standard set forth in the *Restatement* and the Kentucky Supreme Court's opinions, the trial court properly dismissed the Bargers' complaint, as the Court of Appeals found. After reviewing the facts of this case, the Court of Appeals held that, even if Courier-Journal's actions in publishing the photograph showed a "lack of compassion and lack of taste," the conduct clearly was not "beyond all decency" (Opinion at 3-5). Therefore,

the Courier-Journal's actions are not actionable in Kentucky under the tort of outrage. The Court of Appeals merely applied well settled state law, and there are no "special and important reasons" for this Court to review the decision. Sup. Ct. R. 10.1.

In a footnote, the Court of Appeals noted, but did not rely on, the serious constitutional problems which would result from imposing liability on a newspaper on these facts. This Court has recognized that imposing liability for news publications because they are deemed outrageous would seriously implicate rights guaranteed by the First Amendment to the United States Constitution.

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S. Ct. 876, 882 (1988).

Other courts have also recognized that the imposition of liability for news publications deemed to be "offensive or outrageous" would expose necessarily subjective news judgments to risk, and impede the flow of important information to the public. As the Massachusetts Supreme Judicial Court stated in a case involving a photograph of an accident victim:

> A newspaper account or a radio broadcast setting

> forth in detail the harrowing circumstances of the accident might well be as distressing to the members of the victim's family as a photograph of the sort described in the declaration. A newspaper could not safely publish the picture of a train wreck or of an airplane crash if any of the bodies of the victims were recognizable. The law does not provide a remedy for every annoyance that occurs in everyday life. Many things which are distressing or may be lacking in propriety or good taste are not actionable.

Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E. 2d 286, 287 (1951).

As *Kelley* states and the trial court and Kentucky Court of Appeals recognized, if the claims asserted by the Bargers had merit, the media would always be at risk in reporting on any news event resulting in death or physical injury. If the spouses and children of those killed in Vietnam had a cause of action for the "outrageous" publication of photographs of the battle scenes in which their relatives were killed, the public's knowledge about that war would have been severely limited. Are the Bargers seriously contending that photographs of casualties of war and victims of natural disasters like earthquakes may not be published for fear the publication will "offend" and "outrage" the majority of readers? The tort of intentional infliction of emotional distress simply cannot be extended to accurate news publications on matters of public concern.

Courier-Journal's decision to publish the photograph at issue here and to release the photograph for use in other news publications fails the test of an action "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable

in a civilized community." *Humana, supra*, 769 S.W. 2d at 3. The trial court was therefore correct in dismissing the Bargers' complaint, and the Court of Appeals was correct in affirming that decision, as a matter of state law. No special and important reasons justify further judicial review in this action.

III.

THE BARGERS' CLAIM FOR INVASION OF PRIVACY WAS PROPERLY DISMISSED.

A claim for invasion of privacy in Kentucky is governed by "the principles of that tort as enunciated in the *Restatement (Second) of Torts* (1976)." *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W. 2d 882, 887 (Ky. 1981), *cert. denied,* 456 U.S. 975 (1982). The Bargers' privacy claim fails because the privacy rights of the Bargers were clearly not invaded by the publication of a photograph of Mr. Barger's body, and because the matter depicted in the photograph, the shooting of Mr. Barger in a rampage in which twenty other people were killed or injured, was of legitimate concern to the public. The Kentucky Court of Appeals holdings on both points simply applied well settled state law, as expressed in numerous cases.

A. Because Only A Living Individual Whose Privacy Is Invaded May Maintain An Action For Invasion Of Privacy, The Bargers' Claim Fails.

Under the *Restatement,* which the Kentucky Supreme Court has adopted as the law of privacy in Kentucky, it is black letter law that only a living individual whose privacy is invaded may maintain an action for invasion of privacy.

> Except for the appropriation of one's name or likeness, an action for invasion of privacy can be

> maintained only by a living individual whose privacy is invaded.

Restatement (Second) of Torts § 652I. As the comment to the *Restatement* expressly states, the cause of action "cannot be maintained by other persons such as members of the individual's family, unless their privacy is invaded along with his." *Restatement* § 652I, comment a. It is uncontested that the photograph at issue in this action does not include *any* of the Bargers — the petitioners in this action. Their claim that the photograph of Mr. Barger's body (unidentified) somehow invades *their* privacy was therefore properly dismissed.

Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E. 2d 286 (1951), is squarely on point. The plaintiffs in *Kelley* were the parents of a 15-year old girl killed in an automobile accident. Their complaint alleged that a photograph of the girl's body depicted their daughter in a "deformed and hideous manner." *Id.*, 98 N.E. 2d at 287. The plaintiffs in *Kelley*, like the Bargers, did not allege "that any likeness of the plaintiffs or either of them was published." *Id.*, 98 N.E.2d at 287. The court dismissed the complaint, noting that relatives of the person depicted in a photograph simply may not bring an action under these circumstances:

> [I]f the right asserted here were sustained, it would be difficult to fix its boundaries . . . . [I]f the parents had a cause of action in a case like the present there would seem to be no reason why other members of the immediate family, the brothers and sisters, whose sensibilities may also have been wounded should not also be permitted to sue. The only reference to the plaintiffs was that the girl whose body appeared in the photograph was their

> daughter. This can hardly be said to interfere with their privacy.

Id., 98 N.E. 2d at 287-288.

As the Court of Appeals correctly noted, the Bargers "failed to address this defense in their reply brief" to the Court of Appeals and "have cited no authorities which support their right to maintain an action for invasion of privacy in the circumstances presented here" (Opinion at 7). The Bargers have also failed to address the issue in their petition to this Court. The Bargers simply have no standing to maintain an action for invasion of privacy based on the publication of a photograph of Mr. Barger's body. The Court of Appeals applied well settled state law in holding that the Bargers' privacy claim was properly dismissed, and there are no "special and important reasons" to review its decision.

B. Because The Matter Publicized Was Of Legitimate Concern To The Public, The Bargers' Claim Fails.

In their petition to this Court, the Bargers have spent most of their time discussing an independent ground for the dismissal of their privacy claim. In order to succeed in a claim for invasion of privacy based on allegedly unreasonable publicity given to one's private life, a plaintiff must plead and prove two elements, including that the "matter publicized . . . is not of legitimate concern to the public."

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, *if the matter publicized* is of a kind that
>
> (a) would be highly offensive to a reasonable person, and

(b) *is not of legitimate concern to the public.*

Restatement § 652D (emphasis added). In this action, the Bargers did not allege, and certainly could not prove, that the matter publicized, the tragedy at Standard Gravure, "is not of legitimate concern to the public". On the contrary, a rampage in which a mentally disturbed person wielding an assault rifle kills eight of his fellow workers and himself, and injures twelve others, is of substantial, and very legitimate, public concern. Therefore, the Bargers' claim for invasion of privacy fails, as the Court of Appeals correctly found.

Comment g to *Restatement* § 652D offers guidance into the scope of "legitimate public concern", and specifically mentions "homicides and other crimes":

> Included within the scope of legitimate public concern are matters of the kind customarily regarded as "news." . . . . Authorized publicity includes publications concerning homicides and other crimes . . . and many other similar matters of genuine, even if more or less deplorable, popular appeal.

Restatement § 652D, comment g. As the Court of Appeals noted, comment f to that section expressly states that "*the victims of crime" are legitimate subjects of public interest*, and notes that "publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and *victims*, and those who are closely associated with them." *Restatement* § 652D, comment f (emphasis added).

The applicability of the public interest limitation on the right of privacy is a question of law, for the court, not a jury (or those writing letters to the editor), to decide.

> The dispositive issue is the question of the public interest limitation on the right of privacy. This is a question of law to be determined by the court . . . . Disposition of right of privacy actions on motion to dismiss or for summary judgment is a frequent occurrence.

Buzinski v. DoAll Company, 31 Ill. App. 2d 191, 175 N.E. 2d 577, 580 (1961) (citations omitted). As a Florida Supreme Court decision has noted, "the requirement of lack of public concern is a formidable obstacle":

> The developing law surrounding the private-facts tort recognizes that the requirement of lack of public concern is a formidable obstacle. In fact, the "newsworthiness" defense has been recognized by commentators as being so broad as to nearly swallow the tort. *See, e.g.*, Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291 (1983).

Cape Publications, Inc. v. Hitchner, 549 So. 2d 1374, 1377 (Fla. 1989). The decisions of numerous other courts support the view that news articles and photographs concerning the victims of homicides and other crimes, and tragedies of all sorts, simply are not actionable invasions of privacy. In fact, Kentucky's highest court reached the same conclusion in a 1929 decision.

The plaintiff in *Jones v. Herald Post Co.*, 230 Ky. 227, 18 S.W. 2d 972 (1929), was walking along a Louisville street with her husband when he was assaulted by two men and stabbed to death. The widow sued the newspaper, which published a story about the incident and photographs of the plaintiff and her

husband. The complaint was dismissed and the Court of Appeals affirmed:

> The right of privacy may be defined as the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity . . . . In short, it is the right to be let alone. There are times, however, when one, whether willingly or not, becomes an actor in an occurrence of public or general interest. When this takes place, he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an account of such occurrence . . . . [Plaintiff] was an innocent actor in a great tragedy in which the public had a deep concern . . . . On the whole, we conclude that the publication of the photograph . . . was not an invasion of her right of privacy.

Id., 18 S.W. 2d at 973. In this case, as in *Jones,* Mr. Barger became "an innocent actor in a great tragedy in which the public had a deep concern." *Id.* The Bargers' claim, like the complaint in *Jones,* was therefore properly dismissed.

The rule laid down by the Kentucky Court of Appeals in the *Jones* case in 1929 was affirmed by the Kentucky Supreme Court in 1982. In *McCall, supra*, the court clearly stated that the right of privacy does not extend to matters of public concern:

> The right of privacy does not prohibit: (1) any publication of a matter which is of public or general interest.

McCall, supra, 623 S.W. 2d at 887. *See also, Pearce v. Courier-Journal and Louisville Times Company*, 683 S.W. 2d 633, 637

(Ky. App. 1985) and *Bell v. Courier-Journal and Louisville Times Company*, 402 S.W. 2d 84, 88 (Ky. 1966).

Courts in other jurisdictions have also rejected invasion of privacy claims very similar to the one brought by the Bargers. *Waters v. Fleetwood*, 212 Ga. 161, 91 S.E. 2d 344 (1956), involved a newspaper's publication and distribution of photographs of the victim of a gruesome killing. Unlike the instant action, the photographs at issue in *Waters* were "taken at close range" and "showed the decomposition of part of the child's body, and showed it wrapped in chains." 91 S.E. 2d at 345. Nevertheless, the Georgia Supreme Court held that the mother of the victim could not maintain an action for the invasion of the mother's right of privacy:

> The extracts from the above cases illustrate the tendency of courts of other jurisdictions to hold that, where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy. We concur in this view. There are many instances of grief and human suffering which the law can not redress. The present case is one of those instances. Through no fault of the petitioner or her deceased child, they became the objects of widespread public interest . . . . [T]he dissemination of information pertaining thereto would not amount to a violation of the petitioner's right of privacy.

Id., 91 S.E. 2d at 348. The court also noted that the same rule barred the mother's complaint based on the sale of copies of the same photographs which appeared in the newspaper. *Id.* The latter holding is directly applicable to the Bargers' complaint about

Courier-Journal's routine release to other publications of the photograph at issue here.

The Supreme Court of Iowa has also rejected a privacy claim based on a newspaper's publication of photographs of the mutilated and decomposed body of a murder victim. *Bremmer v. Journal-Tribune Publishing Company*, 247 Iowa 817, 76 N.W. 2d 762 (1956). The court found as a matter of law that the discovery of the body of a missing boy was "of proper public interest" and specifically rejected a contention that the public had no legitimate interest in a photograph showing "the appearance of the body", the same contention on which the Bargers now rely:

> Plaintiffs state: "While it may be true that the public was interested in the fact that the missing Bremmer boy was found and whether or not he was dead or alive, the public had no legitimate interest or concern in the condition of the body." That conclusion is without support. *From a news standpoint the public is interested in the appearance of the body of such a local victim. Such appearance may be pictured by words or by photographs or both.*

Id. at 768 (emphasis added). The court also noted that "the courts are not concerned with canons of good taste, and pictures which startle, shock, and even horrify may be freely published . . . if the occasion is such that his right of privacy does not protect him from the publication." *Id.*[4]

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4. Unable to find *any* decision which supports their case, the Bargers cite the *dissent* in *Bremmer*, ignoring the majority holding. *See* Petition at 13.

Relying on *Restatement* § 652D, numerous courts have dismissed complaints based on the publication of news articles and photographs. An example is *Cape Publications, Inc. v. Bridges*, 423 So. 2d 426 (Fla. Dist. Ct. App. 1982), *petition denied*, 431 So. 2d 988 (Fla.), *cert. denied*, 464 U.S. 893 (1983), which involved a newspaper's publication of a photograph of a hostage victim, clad only in a dish towel, after she was rescued by police. A Florida appellate court reversed a judgment for the plaintiff, stating that "[c]ourts should be reluctant to interfere with a newspaper's privilege to publish news in the public interest." *Id.* at 428. The court also stated:

> Although publication of the photograph, which won industry awards, could be considered by some to be in bad taste, the law in Florida seems settled that where one becomes an actor in an occurrence of public interest, it is not an invasion of her right of privacy to publish her photograph with an account of such occurrence.

Id., 432 So. 2d at 427 (footnotes omitted).

There can be no doubt that the news reports about the rampage at Standard Gravure were of legitimate public concern. Indeed, the Bargers do not complain about the thousands and thousands of words and descriptions written and published about this news event, including the words about the conditions of the bodies of the shooting victims (Petition at 14). Rather, they seek to assert a claim based on the explicit nature of one photograph. This is nothing more than a claim based on "good taste," a claim which the courts have time and again refused to accept.

Apparently recognizing the weakness of their claims, the Bargers have contended on appeal that the photograph was taken "through a blatant trespass," and that the manner in which the

photograph was taken supports their claims. The alleged trespass was not mentioned in the complaint. The Kentucky Court of Appeals properly rejected the Bargers' belated attempt to convert their case to a trespass action, for several reasons.

As the Court of Appeals recognized, only the owner or possessor of property may maintain an action for trespass on it. *Marinaro v. Deskins,* 344 S.W. 2d 817, 819 (Ky. 1961). Only Standard Gravure, which owns and possesses the property where the photograph was taken, would have standing to maintain a trespass action, and neither it nor any public authority has filed any action regarding the photographer's presence at the crime scene.[5]

Moreover, even if the Bargers had pled their trespass claim and could maintain a trespass action, neither of which is the case, this Court has held that no trespass occurs when under the "habits of the country" entry is commonly made under the circumstances presented. *McKee v. Gratz,* 260 U.S. 127, 136 (1922). As the Kentucky Court of Appeals noted, entry of media personnel into crime scenes is a commonly accepted practice. In dismissing a claim by the mother of an accident victim concerning a photograph of the "silhouette" left on the floor after the removal of the victim's body, the Supreme Court of Florida stated:

> [I]t has been a long-standing custom and practice throughout the country for representatives of the news media to enter upon private property where

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5. *Le Mistral, Inc. v. Columbia Broadcasting System,* 61 App. Div. 2d 491, 402 N.Y.S. 2d 815 (1st Dept. 1978), upon which the Bargers rely, is a trespass case brought by a restaurant owner for trespass in the restaurant by a television reporter and camera crew. This case is easily distinguished from *Le Mistral.* It is not a trespass action and it is not brought by the owner of the Standard Gravure property.

> disaster of great public interest has occurred — entering in a peaceful manner, without causing any physical damage, and at the invitation of the officers who are investigating the calamity.

Florida Publishing Company v. Fletcher, 340 So. 2d 914, 918 (Fla. 1976), *cert. denied,* 431 U.S. 930 (1977).

In this case, the photograph was taken in a building adjoining Courier-Journal's offices, which is connected to those offices by a series of hallways and tunnels, and no one directed the photographer not to enter the premises, or told him to leave, before the photograph was taken. As the Court of Appeals correctly held, "the Courier cannot be denied its defense of newsworthiness on the ground that its photographer committed a trespass in order to obtain the victim's photograph" (Opinion at 10). There are no "special and important reasons" to review the Court of Appeals decision, and the Bargers' petition should be denied.

CONCLUSION

The Bargers suffered a tragic loss in the death of their husband and father. Courier-Journal and Gannett regret any distress which news coverage of their loss may have caused them. Nevertheless, the photograph at issue simply is not actionable, as numerous similar cases have held. The trial court and Kentucky Court of Appeals merely applied those cases, and the holdings of the Kentucky Supreme Court, in rejecting the Bargers' claims on state law grounds. This Court therefore lacks jurisdiction to review the judgment. Even if this Court had jurisdiction, there are no "special and important reasons" to review the Court of Appeals decision. Indeed, *every* similar case is in accord with the decision. Therefore, Courier-Journal and Gannett ask this Court to deny the Bargers' petition for writ of certiorari to the Kentucky Court of Appeals.

Respectfully submitted,

JON L. FLEISCHAKER
Counsel of Record
WILLIAM H. HOLLANDER
WYATT, TARRANT & COMBS
Attorneys for Respondents
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235